THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION Nos.26341 AND 26342 OF 2006

DATED 04th JANUARY, 2007

BETWEEN:

M/s.Zuberi Engineering Company

... Petitioner

AND

The Managing Director, A.P.Power Generation Corporation Limited, Vidhyuth Soudha, Hyderabad, and others.

... Respondents

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION Nos.26341 AND 26342 OF 2006

COMMON ORDER:

The petitioner and respondents being the same in

both the writ petitions, a common order would be appropriate.

The petitioner is a registered firm having its Registered Office in Jaipur, Rajasthan, engaged in the business of executing turnkey thermal power products and municipal water supply schemes. In response to tender notice (hereafter called, the First tender notice), dated 25.08.2006 bearing No.432/KT PPD/F Raw Water Reach 2/D No.378/2006 of e-platform, the petitioner submitted tenders on 16.10.2006. Tender related to the work of providing and laying of 965MM O.D.M.S.Raw water pumping main from Chainage 30.0 Km at Intermediate Booster Pumping Station at Kataram to Chianage 46.0 Km for Kakatiya Thermal Power Project at Chelpur village of Ghanapur Mandal in Warangal District. The petitioner also submitted tenders pursuant to a similar tender notice, dated 25.08.2006 (hereafter called Second tender notice) in respect of reach 3/D. The entire work, for the sake of clarity and convenience was divided into 44 items of work in Schedule A to tender notice. As per Schedule A of First tender notice, item 24 of the work was to the following effect.

> Supply, transporting, lowering, laying and jointing, testing, commissioning of ERW/Spirally welded MS pipes (Fe 410) conforming to IS"3589 (2001) with latest amendments including perfect linking and welding of joints to correct position including cost and conveyance of pipes and materials, power supply, incidental and operational charges, with all leads and lifts/delifts, cost of all labour and giving satisfactory Hydraulic test as per IS:3589 (2001) with latest amendments for test pressure and working pressure bothe at factory and site etc., complete as per detailed specifications with inside lining/coating and out side 4mm tape coating consisting of applying pipe coat primer of fibrous coal tar and solvent based rubber modified bituminous primer of density 0.92 gms/Cu cm and viscosity of 1000 – 2000cps @ 150 gms/Sqm., followed by seven layers (4 mm thick) of polyethence polymerized bitumen and bitumen and polyester (of local seven layers) pipe coat 4 mm thick prefabricated tape wrapping confirming to IS:10221 and AWWA C203, loading and unloading of pipes for the following diameter and specified thickness of plate as noted below. The rates are inclusive of all taxes and duties (Contractor shall make his own arrangement for procuring water for testing). Complete for finished item of work and as directed by the

Engineer-in-charge.

Even in respect of Second tender notice, item 24 gave the above specification. As per the tender notices, the last date for issue of tender schedules was 29.09.2006 and the last date for submitting tenders was 05.10.2006 up to 3.00 pm and these tenders were to be opened on the same day at 4.00 pm. The petitioner alleges that it is a joint venture (JV) partner with M/s.PSL Limited, which is allegedly a leading spiral SAW Pipe manufacturer in India with a capacity of over 1 million ton per annum having its manufacturing facilities at Visakhapatnam in Andhra Pradesh, Kandla in Gujarat and Chennai in Tamil Nadu. The petitioner further alleges that it has five years of association with M/s.PSL Limited, New Delhi, and has been jointly working in many projects. The petitioner had even discussed with M/s.PSL Limited after studying the work items in Schedule A of the tender notice.

On 05.10.2006, according to the petitioner, all the bidders were present before the third respondent. The issue of MS pipes was discussed with all the bidders and the opening of tenders was postponed. Subsequent thereto, respondents amended item 24 of Schedule A to the following effect.

> Supply, transporting **the pipes manufactured by Steel Authority of India Ltd/JINDAL Steel/Visaka Steel Plant/TATA steel,** lowering, laying and jointing, testing, commissioning of ERW/Spirally welded MS pipes (Fe 410) conforming to IS”3589 (2001) with latest amendments including perfect linking and welding of joints to correct position including cost and conveyance of pipes and materials, power supply, incidental and operational charges, with all leads and lifts/delifts, cost of all labour and giving satisfactory Hydraulic test as per IS:3589 (2001) with latest amendments for test pressure and working pressure bothe at factory and site etc., complete as per detailed specifications with inside lining/coating and out side 4mm tape coating consisting of applying pipe coat primer of fibrous coal tar and solvent based rubber modified bituminous primer of density 0.92 gms/Cu cm and viscosity of 1000 – 2000cps @ 150 gms/Sqm., followed by seven layers (4 mm thick) of polyethence polymerized bitumen and bitumen and polyester (of local seven layers) pipe coat 4 mm thick prefabricated tape wrapping confirming to IS:10221 and AWWA C203, loading and unloading of pipes for the following diameter and

specified thickness of plate as noted below. The rates are inclusive of all taxes and duties (Contractor shall make his own arrangement for procuring water for testing). Complete for finished item of work and as directed by the Engineer-in-charge.

The highlighted portion in the above paragraph was amendment, which was informed to the petitioner by the second respondent vide letter, dated 05.10.2006. Thereafter, the petitioner as mentioned earlier submitted tenders on 16.10.2006. The third respondent, by letter, dated 01.11.2006 informed the petitioner that they have deviated from the tender conditions and were asked to withdraw the deviation. The efforts of the petitioner to respondents to accept the deviation with regard to the item No.24 of Schedule A were not fruitful. When the prize bid was about to be opened on 19.12.2006, the petitioner filed these two writ petitions – one in respect of First tender notice and the other in respect of Second tender notice.

In both the writ petitions, the petitioner seeks a writ of Mandamus declaring the action of the respondents in making the amendments to item No.24 of Schedule A to the tender notification as illegal and arbitrary, for a direction to set aside the same and for a consequential direction to issue tender notice in respect of both the works. At the stage of Admission itself, learned standing counsel for A.P.Power Generation Corporation Limited (A.P.Genco) took notice and filed counter affidavit on 27.12.2006. Therefore, the matter was heard finally.

From the counter affidavit filed by second respondent, following averments need to be noticed. Kakatiya Thermal Power Project at Bhupalpalli requires raw water. This has to be drawn from Godavari River in Metpalli. To facilitate the same, a pipeline of 62 KM length is proposed. The distance is divided into three reaches, namely, providing and laying pipeline main from Head Works near Kaleswaram to Intermediate Booster Pumping Station at Kataram, providing and laying water pumping main from Chainage 30.0 Km at Intermediate Booster at Kataram to Chainage 46.0 Km and providing and laying pipeline from 46.0 KM to 62.0 KM. Keeping this in view, tenders were invited in two parts: Pre Qualification Bid (PQB) and Price Bid (PB). As per the procedure

qualified contractors would received tender specification in two parts. The applicants can have joint ventures, which will also be taken into consideration for the purpose of experience and qualifications and only those bids, which are responsive at PQB stage, will be considered at the next stage. Seven Companies/concerns applied for tender specifications/tender schedules before the last date i.e., 29.09.2006. On 04.10.2006, a Pre Bid Meeting with all the tenderers was held. All of them requested for clarification regarding clause/item of work 24 and also requested to allow a gap of at least ten days from the date of Pre Bid Meeting to the date of submission of tenders. Considering the request, the last date for receipt of tenders and opening of tenders was changed to 16.10.2006 up to 3.00 p.m., and 16.10.2006 at 4.00 p.m., respectively. Further, although the technical specification for the pipes was specified as IC 2062 Grade 'B' Steel, as there was confusion among the tenders, item 24 was also clarified as all the tenderers are requested to indicate source of pipes (which are the backbone of the total project). Keeping in view the better quality of the structure, it was clarified to contractors of supply readymade pipes as per specifications obtained from vendors like SAIL, TATA Steel, Jindal Steel and Visaka Steel Plant. A communication, dated 05.10.2006, was sent by Fax to all the tenderers. Seven tenderers including the petitioner who attended the Pre Bid Meeting, submitted tenders by 16.10.2006. The petitioner submitted tenders only in the name of Zuberi Engineering Company not as a JV with M/s.PSL Limited. That the petitioner has a JV partnership with M/s.PSL Limited was known only after opening tenders for PQB. Further, the petitioner never requested to include the readymade pipes manufactured by PSL pipes, New Delhi, nor raised any objection after receiving the communication, dated 05.10.2006. All the other allegations made by the petitioner are denied. Be it also noted, similar counter affidavits are filed in both the writ petitions.

Learned counsel for the petitioner submits that the action of the respondent in amending item 24 of Schedule A of the tender unilaterally is arbitrary and illegal. He submits that any action of the tendering authority to exclude a particular tenderer is a discriminatory as all the

tenderers have a right to be treated fairly in the matter of consideration of the tenders. He placed strong reliance on the decision in **M/s.Godavari Polymers Private Limited v Agricultural Products Commissioner & Principal Secretary**[1].

Per contra, learned standing counsel for A.P.Genco submits that the tender condition 24 was clarified as requested by all the tenders in Pre Bid Meeting held on 04.10.2006 and the petitioner never raised any objection. Secondly, she submits that while submitting PQB, which were opened on 16.10.2006, the petitioner resorted to deviations from commercial and technical specifications. Therefore, the petitioner was once again requested to withdraw the deviation and furnish a copy of the JV Agreement, and he failed to do so. She further submits that the tenders are already finalized.

The main contention of the petitioner in assailing the action of the respondents is twofold. He would urge that the respondents followed hidden criteria while evaluating the response of tenders and that the tenderers were not informed of the amendment to item 24 of tender schedules. He also denies the receipt of any notice after item 24 was amended. There cannot be any dispute that in exercise of contractual powers, the State has to follow a fair procedure. All persons should be treated equally and fairness should inform every stage of tendering process. In doing so, public interest should be subserved. These principles are well settled. In **Godavari Polymers Private Limited** (supra), this Court after referring to many decisions of the Supreme Court culled out as many as fourteen principles governing the judicial review of contractual matters of State. The counsel placed reliance on principles of (iii) (iv) (vi) (vii) and (xiii), which read as under.

> (iii) The Government's exercise of contractual powers must adhere to principles of equality before law and equal protection of laws keeping in view Articles 14, 15(1), 298 and 299.
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> (iv) All the eligible, qualified and suitable persons are entitled to claim right to be treated equally in the matter of awarding contract by the Government and public authorities.
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> (vi) The Court of Judicial review cannot interfere with the Government's absolute right to enter into contract with citizens unless such action is contrary to public interest, arbitrary

and/or discriminatory.

(vii) When the award of contract by a public authority or State is challenged before the Court, ordinarily the decision cannot be interfered with, unless the Court is satisfied that there is some element of public interest involved in entertaining such writ petition. By award of the contract, if the best price or best service is procured the same generally would subserve public interest and mere price difference between two tenderers may or may not be decisive in deciding whether any public interest is involved.

(xiii) So as to get the best price, best goods or best services, even if the Government enters into negotiations with all the eligible tenderers, there should be equality in the process, in that all the tenderers should be given an opportunity to participate in the negotiations. If the process is fair and not arbitrary, the absence of power to negotiate would not vitiate the decision-making by the public authority.

The respondents did not dispute the above principles. They, however, contend that item 24 was only clarified and to remove any weakness or confusion regarding source of MS pipes to be used in the works, as requested by the tenderers, it was amended. No other condition of the tenders were changed or amended and all the tenderers were aware of the same. There is force in the submission made on behalf of the respondents.

Procurement of goods and execution of works by the State following a fair and equitable procedure can be ensured by adhering to transparent process. Inviting tenders, open bids and conducting action in open are intended in that direction. A tender notification is an invitation to offer inviting prospective bidders to offer their bids for supply of goods or execution of works subject to certain conditions. It is always the privilege of the employer to impose conditions subject to which the offers would be evaluated for their response. Therefore, if the conditions of tender are changed or specifications of the goods to be supplied are altered either because the employer wants to introduce clarity or because of stringent quality control, the same cannot be faulted if such alteration or modification of tender conditions is equally applicable to all the offerers. This is ordinary Rule, which must receive the approval of the Court if such power is exercised in a fair manner without arbitrariness ensuring equal treatment to all the offerers. So to say, the tender

conditions being in the nature of executive instructions imposed by the employer, they can always be changed subject to the principle just reiterated herein.

The chronology of events in this case would show that the last date for submission of tenders was 05.10.2006 in one case and 12.10.2006 in another case. As many as seven contractors applied and got tender schedules. As per the instructions of the Director (Technical) of A.P.Genco., a Pre Bid Meeting was called on 04.10.2006. All the applicants requested to extend the time for receipt of the tenders up to 16.10.2006 (instead of 05.10.2006 and 12.10.2006). During the Pre Bid Meeting, tenderers also requested to clarify about the source of pipes for the purpose of item 24 of Schedule A of tender specifications as contractors were required to procure the pipes from repeated manufacturers conforming to IS 2062 of Grade 'B' steel. A request was also made by those tenderers who procured tender schedules, for payment against item 24 with break up for supply, laying and testing as huge funds would get locked up if payment is made only after completion of testing and commissioning as per tender specifications. Therefore, a decision was taken in the presence of all the applicants or their representatives to clarify these two items and accordingly communication was sent by the Chief Engineer on 05.10.2006 to all the applicants informing that the pipes to be used in the work should be manufactured by SAIL/Jindal Steel/VSP/TATA Steel. The payment for the item 24 was also clarified to the effect that 50% of the quoted rate after manufacturing, transportation and supply of pipes at the site, 40% after completion of inside lining and outside tape coating and laying in position in the trench and 10% of quoted rate after testing and completion of the work.

The decision taken by the Chief Engineer at the Pre Bid Meeting attended by all the persons who obtained tender schedules including the petitioner was indeed to help the successful tenders to complete the work without any confusion in procuring the material and completing the work while ensuring the payment schedule for item 24 works. Viewed from any angle, there cannot be any complaint of arbitrariness or unilateral amendment of the tender conditions. The submission that a hidden criteria was followed is also totally unacceptable.

The respondents acted very fairly, even while dealing with the petitioner. After receiving the tender submitted by the petitioner on 16.10.2006, as extended, the tendering authority having found that there is a deviation in the tender submitted by the petitioner, sent a letter on 01.11.2006 informing that the deviation is not acceptable. The petitioner was requested to withdraw the deviation and was requested to furnish JV agreement with M/s.PSL Limited. This is because the petitioner mentioned in the tender that the tender is in JV with M/s.PSL Limited and that offer is made on the supply of PSL pipes makes only for meeting the completion schedules specified. This was certainly deviation because as was communicated by the Chief Engineer by letter, dated 05.10.2006, all the tenderers were advised to quote the rate for readymade pipes as per specifications obtained from vendors like SAIL/TATA Steel etc. The petitioner has not filed any reply affidavit denying the allegation, and therefore, the averment in the counter affidavit stands admitted.

During the course of the arguments, the learned standing counsel for A.P.Genco., submits that the petitioner's tenders were eliminated at PQB stage as there was deviation and a successful tenderer has already been evaluated. This is also not denied by the learned counsel for the petitioner.

In the result, for the above reasons, the writ petitions are devoid of any merit and are accordingly dismissed. No costs.

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(V.V.S.RAO,J)

04.01.2007.
pln

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[1] 2004 (1) ALD 783